United States Court of Appeals

for the Second Circuit

APPENDIX

75-1318

B
P/S

United States Court of Appeals

For the Second Circuit

Docket No. 75-1318

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

RICARDO INNISS,

Defendant-Appellant.

BRIEF AND APPENDIX ON BEHALF OF APPELLANT

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UNITED STATES OF AMERICA,

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-against-

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- X

BRIEF ON BEHALF OF APPELLANT

Appellant, RICARDO INNISS, appeals from a judgment of the United States District Court for the Eastern District of New York, rendered August 1, 1975, convicting him of conspiring to import and distribute cocaine between February, 1974 and June, 1974, and one count of possession of cocaine. Appellant was given a sentence of eight years imprisonment and parole eligibility after one year, pursuant to 18 U.S.C. Section 4208(a)(1) plus five years special parole.

This action was tried to a jury from July 7, 1975 to July 16, 1974, Hon. Orrin G. Judd, presiding. The appellant is not at liberty pending this appeal due to his inability to post a $75,000.00 surety bond.

Statutes

21 U.S.C. Section 841 — Prohibited acts A - Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Penalties

(b) Except as otherwise provided in Section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000., or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000., or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

21 U.S.C. Section 952 — Importation of controlled substances -- Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II or subchapter I of the chapter or any narcotic drug in schedule III,IV, or V of subchapter I of this chapter ...

18 U.S.C. Section 2 Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induced or procures its commission is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Facts

Prior to the actual commencement of the trial herein, there was lengthy discussion about whether Ira D. London, attorney for the appellant, could continue to represent him because of the possibility that he might become a government witness. It seemed that the main government witness, Manuela Cortes-Canate, was once represented by Mr. London briefly, and the government wished to call him as a witness to determine who retained him or paid his fee as evidence relevant to the conspiracy.

In addition, the issue of whether London could fully cross examine Canate was raised, since he would have obtained knowledge from the representation, or that he might not be able to ask certain questions because of that knowledge, an unlikely situation because of the Court's later ruling that the very act of Miss Canate's testifying waived that privilege (A15).

However, appellant insisted that he wanted London, that he had confidence in him, that he represented him before and that during cross examination, if embarrassing or damaging things came out, he would take his chances (Minutes, February 18, 1975, pp. 9-16, A7-A12).

On the next Court appearance, April 21, 1975, the Court and the prosecutor both agreed that no cases had been found where a defense attorney was disqualified in a criminal case, and again on April 25, 1975, London told the Court that he had extensive meetings with appellant and Inniss still wanted him to continue (A9-A10). London cited People v. Wilkins, 320 N.Y.S. 2d 8 (1971), which held that you can not assume an attorney will reveal confidential matters. Also, the old case with Canate had nothing to do with this one. Appellant still indicated he wanted London and waived any conflict claim (A11-A12, A13).

Then, on May 7, 1975, London told the Court that he conferred with the prosecutor, he knew what questions would be asked, he related what his answers would be, and London asked to be relieved. The prosecutor said that London would testify that one of the defendants, (McLenan), retained him in Canate's case. Inniss had nothing to do with it, and London said if the case were severed he'd remain in, but the Court and the prosecutor refused to agree to a severance (A14). The Court also held that it would allow evidence of who paid the retainer as bearing on the conspiracy so London requested to be relieved. He also said that the real reason was the prosecutor's fear of his reputation for cross examination. The Court also wrote a memorandum on the subject of whether Inniss had to surrender his Panamanian passport, which he did, over objection. (February 18, 1975, pages 21-22; April 25, 1975, page 7; May 19, 1975, page 6).

Finally, appellant retained Marvin Preminger, and the case began on July 7, 1975.

Manuela Cortes-Canate, a 40 year old Panamanian seamstress, said that during the Carnival fiesta in Panama she talked to Gertrude McLenan about coming to the United States (49-50). They met the next day at the Hotel Caribe in Panama City and although appellant was present, she discussed going to the United States with McLenan when the two of them went for a walk. McLenan asked her if she would first go to Colombia to obtain cocaine, so thereafter she went to see her cousin to ask if she could help find people who would sell cocaine (54). The cousin said she could get it through one Roberto Alvarez, so the witness, McLenan, appellant and Cecelia DeLeone all went to Colombia (59).

McLenan bought the tickets and they flew to Colombia, there taking a bus to the Bahia Hotel in cartagena (61). The next day her cousin brought Alvarez (62) and he discussed the matter with Canate and told her he could get cocaine (63-64). Later Alvarez returned with a sample which appellant tested by tasting it (65). Appellant said it was good so Alvarez left and returned the next day with the cocaine (67). Cecelia and Canate sewed it into a handbag (67-68). There was no testimony about money.

The group did some sightseeing and then applied for visas to go to Mexico, which they received the next day (70-72). They went to Avianca to change their airlines tickets, McLenan paid the difference for all, and they all flew to Mexico (72-74).

In Mexico, all four people made their way to Tijuana, where

they registered at a hotel. They could not find someone to help them cross the border illegally, so McLenan and Inniss crossed because they alone had passports to enter the United States (76). McLenan carried the cocaine (77). Later, the two came back and that evening they, Cecelia and Canate crossed with the aid of a Mexican they met at the Toreador Motel. They drove to Los Angeles where they stayed in a hotel.

The next day, Canate, McLenan and Cecelia flew to New York, but appellant returned to Panama (84). The three women took the cocaine to 649 Sterling Place, McLenan's home, and a week later, appellant joined them (85). He took the cocaine and returned a few days later after apparently having broken it down into smaller packages (91-94). The wit-n ess also said that Inniss would come to theapartment from time to time and take small packages out. He would meet people downstairs, come up, get a package and go down (95-96). She recognized the picture of one man she saw talking to Inniss and one time she even threw a package out of the window to him (99-106).

Thereafter, McLenan got a letter that her mother was sick and she asked Canate to go back with her to Panama (108). Canate had no passport because she had entered the United States illegally. McLenan told her not to worry and a short time later appellant brought her a birth certificate of a Puerto Rican woman named Joanna Perez, which she used (108-111). The witness also agreed to pick up more cocaine, so McLenan bought the tickets for herself and for Joanna Perez (114-115). The time was May, 1974,and they went back to Panama via Braniff Airways.

McLenan visited her mother and Canate went to Colombia with her cousin, Maria Fernandez (115-116), with money to make the purchase that had been supplied by McLenan (116-117).

The two women went to Colombia. Now she used her own passport, and they met Roberto Alvarez again. He gave them cocaine for the money and Canate sewed it into her handbag again. Canate returned to Panama alone and went to McLenan's mother's house where she turned over the handbag (122). They went to Mexico to buy a religious statue and then flew Eastern Airlines to New York, with Canate again using the name Perez (123-124).

After the two women arrived in New York, they had to go through customs. While going through she was arrested. McLenan had already passed through so she was left alone (125). The customs officials searched Canate's luggage and they took her pocketbook, tearing out the bottom (133). The cocaine was seized, she was taken to Riker's Island and she never saw McLenan again until this trial (134). That was June 1, 1974.

The Court appointed an attorney for her but then another lawyer, Ira D. London, came and spoke with her in jail (134). He said that her family and friends hired him and she saw him twice, the jail interview and the day she pleaded guilty (135-136). London told her that her family and friends had retained him, but she had none in the country. After she pleaded guilty he told her that McLenan had paid him (136). She thereafter decided to cooperate, obtained a Legal Aid attorney and ultimately received a fifteen months sentence (137-139).

On cross examination she admitted that Roberto Alvarez was a fictitious name she made up and that she had family in Cartegana, Colombia,whom she visited many times (153-155). She denied being a real big buyer and bringing in Inniss and McLenan only becasue this time she got caught (162). She also conceded that she first met appellant in Panama City when he was there for the Carnival and she knew he was also there to see his sick father (169-170). She denied knowing much about cocaine, she got no money from the first amount they brought in and she never even examined the package before or after it was sewn into the handbag (178-182). She also said that McLenan went back and forth often to visit her family and that she really wanted to come to the United States for a long time (207,213-214,217).

Frank Anton, a customs inspector at Kennedy Airport said that on June 1, 1974, he was inspecting baggage when Canate came through the line as Joanna Perez (251). When he saw her birth certificate he became suspicious because of her limited English, which was strange if she was born in the United States (252). When he sought to look into her handbag, she said "No,no", so he searched it, found the false bottom and seized the cocaine (253-257).

Other witnesses testified with relation to the introduction of documents which were consistent with Canate's story, but were also consistent with appellant's position that they were only visiting. Thus, Hector Garcia, who worked at the Del Toros de Motel, on the American side of the Mexican border identified the registration card for two people when appellant registered on March 15, 1974, giving his address as 649 Sterling Street, Brooklyn, New York (281). He also remembered

Inniss and McLenan (282-283), although 2,000 people registered since then and there was nothing special about them (286-287). Of course, a sensible explanation is that he was coached by Federal agents who came to him in San Diego and showed him pictures of people he had to identify (288). He wasn't sure he could have identified them without that help (288).

Patricia Dugue, the station manager of Avianca Airlines, identified the manifest of March 13, 1975, showing that the group travelled from Bolata to Mexico City (299);and Paul V. Maloney, who arrested McLenan a year later, identified her address book which showed a notation relating to the motel in Mexico (306).

John Bock, the ticket sales manager at Braniff Airways, identified the tickets for the May 26th flight from New York to Panama for McLenan and Joanna Perez (309-311). He also identified the tickets that the two ladies used to fly to Mexico City on June 1, 1974 (311). A stipulation identifying the hotel records of the Hotel Caribe was entered showing that McLenan took a room for two people and the visa application for McLenan, Cecelia and appellant were also marked (316-317).

The next witness was Edgar Adamson, a customs agent. He was allowed to testify, over objection, that in February, 1972, two years earlier, he stopped appellant at the airport. At that time appellant was travelling with two women, one of whom was Joanna Perez and who used the same birth certificate (322-324). This key testimony was used to show where appellant obtained the birth certificate he later obtained for Manuela Canate and it certainly was an amazing feat of memory for

Adamson to be able to recall the use of the birth certificate two years earlier when no contraband was found (326-327), so that it must have been a routine event.

Michael Levine, a Customs Bureau agent talked about the value of cocaine, and John Featherly, a narcotics agent,introduced the Panamanian passport of appellant, over objection on the basis of self-incrimination (330-336, 349-352). The passport showed various entries and exists from Panama and Colombia (353-357).

Laura Seale, a travel agent, testified that McLenan bought and paid for airline tickets for herself and Joanna Perez for a New York to Panama and for a Panama to Mexico City flight (387-389), and Irene Vorilas of the Manufacturers Trust Company introduced a $7,000.00 bank check which was the proceeds of a savings account withdrawal by McLenan on February 4, 1975 (396-399). She also got $500.00 in cash on that date and cashed a personal check for $4,400.00 two weeks later, on February 19th (400-401). There was another withdrawal on February 20th of $7,500.00 (401) and various deposits in April, totalling about $6,350.00 (402-404). On cross examination she conceded however, that the amount the account started with before the first withdrawal and the amount it ended with after all of the withdrawals and deposits was approximately the same (409).

The government rested (416). The normal motions were argued and denied (418-419) and then appellant also rested (421-422).

The other defendant, Gertrude McLenan, testified in her own defense. She was a seaman, a waitress and a cook, and she travelled

on ships all over the world, earning $500.00 per week (428-431). The bank account reflected money she earned, saved and money she won on numbers bets (436). She knew Manuela Cortes-Canate since she was a girl in Panama and she visited Panama often to see her family. Each time Canate asked her to help her come to the United States (438-439).

On the first occasion that Canate said drugs were discussed, Inniss did not go down with her. They met by chance at the Carnival and simply decided to travel together (440-442). She went to Colombia to visit her cousin, Maria Fernandez (444). The $7,000.00 withdrawal was a loan to a friend, Mr. Beresford, who repaid it in installments (549). She explained her reasons for travelling, to visit her sick mother, her family,to buy a religious statue in Mexico, and just for pleasure, the net result of which was to make all of the various visas, hotel registrations and other documents just as corroborative of her story as that of Manuela Canate. She denied dealing in drugs and she said that Inniss did not either. He never did anything with envelopes or white powder and, in fact, was hardly ever in her home (481).

She helped Canate only because of friendship and, in fact, tried to get her a job through the State Employment Agency, an effort which proved to be successful (482-483). She made the second trip to Panama because while serving on a ship in Greece, she received word her mother was ill. She left the ship, got a visa in Athens and returned home (484-485). Canate wanted to go with her, so she bought the tickets. The trip had nothing to do with narcotics. When they got

to Panama, she stayed with her mother while Canate went to Colombia (491).

Afrer Canate was arrested, McLenan hired Ira London because Canate's sister called and asked her to get counsel, promising to refund the money. She added that Inniss had nothing to do with drugs (507-508) and on cross examination admitted knowing Doug Welch very slightly but not enough to even say hello (532). She also said that appellant went to Panama for the Carnival, paid for his own ticket, and that he worked as the manager of the Baby Grand Night Coub (548-550).

Manuela Cortes-Canate officially waived her attorney-client privilege, although the Court ruled that in testifying she had anyway, and then Ira London was called as a witness. He said that McLenan came to him and said that a friend had been arrested and her family had asked her to get a lawyer (A25). He looked into the case first, decided to take it and received $1,000.00. He went to speak to Canate at Riker's Island (621) when he told her that McLenan had retained him. He asked Canate if McLenan had anything to do with the narcotics charge and Canate said that she had not (A26).

On cross examination, London said that Canate went over all of the facts and circumstances of the case with him and <u>never once</u> said that Inniss was involved (A27). Canate never told him she saw Inniss taste cocaine or say it was good (A27-A28) and she never said McLenan was involved or <u>he would not have taken her case</u> (A28). Before taking a plea, he told his client she could help herself by cooperating, but she said she only knew two people involved, Louisa Morales and Carlos

Morales (629). Carlos was in New York to receive the pocketbook while Louisa waited in Mexico (630). Mr. London also said that McLenan had not been recommended by Inniss but by one Phyllis Newsuma (636).

The government called Douglas Welch in rebuttal over strong objection that such a witness would testify to new matters and was way beyond the scope of cross examination (659). Nevertheless, Mr. Welch, a Panamanian, who had a long criminal record for assault with a gun, robbery, bail jumping and was a dealer in narcotics, was permitted to testify. He said that he bought cocaine from McLenan and appellant in 1973 on five or six occasions. She was living at Sterling Street and many times he bought from her and later paid Inniss, and sometimes he bought from Inniss and paid McLenan (674-680). These dealings all occurred in 1973, a year before the period of the indictment. Objections were made, but the Court merely told the jury that it was beyond the indictment but could be used on the question of the defendants being co-conspirators and regarding their knowledge of cocaine.(680).

The witness went on to describe more cocaine sales and was even allowed to detail how he met both defendants in Panama in February, 1974, and he told them where in Tijuana they might find someone who could help them cross the border (684-686).

Welch also said that in March, April and in the Summer of 1974, he again bought cocaine from both defendants on various occasions. (689-693). He was arrested in October, 1974 for selling cocaine to an agent, pleaded guilty and was awaiting sentence (693-694).

On cross examination, Welch revealed a most sordid background. He shot someone, committed a robbery in Panama and had been sentenced

to jail five or six times in Panama, the first time when he was seventeen years old (713). His statements before the grand jury and his answers at the trial showed that the witness had little regard for the truth (729). The witness had been cooperative with the government since his arrest for selling cocaine to an agent, yet he never mentioned Inniss as a dealer in cocaine (739). Another startling fact is that the witness allegedly resold the cocaine he bought from McLenan and Inniss to about ten to fifteen people, but he could not remember anyone of them (745).

After Antonio Hernandez, a Mexican official,introduced the visas and visa applications, the case ended and motions to dismiss were denied (842).

The Court in its charge discussed the evidence somewhat and remarked:

> "Here there is corroborating testimony, at least with respect to details that the Government has mentioned." (1084)

The Court also stated, as a fact, that appellant provided the false birth certificate (1087-88) and that Canate has less reason to lie now because she had almost completed serving her sentence (1084).

Objections were taken (1100-01) and even on sentence, appellant's attorney again pointed out that the Court should not have told the jury that appellant furnished the birth certificate (1105).

POINT I

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE SIXTH AMENDMENT. THE COURT CLEARLY INDUCED THE ATTORNEY OF HIS CHOICE TO WITHDRAW FROM THIS CASE.

Prior to the trial of this action, the question arose regarding whether appellant's retained attorney, Ira D. London, should be allowed to represent him. The government made strenuous objection all during the proceedings and was the precipitate force that ultimately led to London's withdrawal. It seems that the main government witness, Manuela Cortes-Canate, was once represented by Mr. London briefly and the government represented that it might call London as a witness, and also there was a question as to whether London could properly cross examine Canate about matters he learned by virtue of his representation (A15-A24). Ultimately, as it turned out, there was probably not a material question at all, since the Court later ruled that the mere fact that Canate took the witness stand against London clearly waived her privilege (A15), but after she spoke to her Legal Aid attorney, she effectively waived it anyway (A24). London stressed prior to the trial that he really could see no conflict, and that his representation of Canate itself had nothing to do with Inniss, which turned out to be true. The facts were that London was hired by McLenan to represent Canate when she was arrested, that London was told Canate's friends and relatives in effect hired him and that he in no way discussed the case at bar (A25). Basically, the only thing London did was to dispose of the case by way of a plea. She did not begin to cooperate with the government until after she was sentenced. There was no conflict between London's

representation of Canate and his representation of Inniss. London ultimately testified, but his testimony certainly did not hurt his client, Ricardo Inniss. In fact, it helped appellant because London stated that he asked Canate if Inniss or Gertrude McLenan had anything to do with the drime with which she was then charged and Canate said no (A26). In fact, London testified that had the answer been otherwise he would not have taken the case (A28).

During the many discussions had before the trial began, the attorney reiterated the facts again. It is indisputable that the government made a great effort to get London out of the case, and although London claimed the real reason was because he was adept at cross examination, the point is, at no time did the government really show facts which would be a basis for requiring that London step out. The matter could have been solved very easily, as Ira D. London pointed out, by severing the two cases, but this the Court and the United States Attorney were not willing to do (A14). In discussing the law with respect to this issue, one fact is indisputable. That fact is that appellant was at all times fully aware that his attorney had once represented a government witness and at all times said he would take his chances. He would waive any claim based upon the duel representation and that he still wanted his retained counsel to represent him (Minutes February 18, 1975, pages 9-15, A9-A10, A11-A12, A13).

There is not one single case reported, and the Court and prosecutor even alluded to that fact during the discussions, requiring a Court to force an attorney to withdraw when his client is made aware of the fact and expresses a desire to continue representation. The only duty of

the Court is to fully advise the client of the potential conflict, but if the client insists upon having his attorney continue, he has a right to continue to be represented by the lawyer of his choice. The Supreme Court of the United States long ago recognized that the assistance contemplated by the Sixth Amendment meant an untramelled, unimpaired assistance, and that the only duty of a Court in conflict situations is to make sure that a defendant knows the facts, knows of the conflict and intelligently chooses his attorney freely and with a knowledge of the situation. Glasser v. United States, 315 U.S. 76; Campbell v. United States, 352 F.2d 359 (D.C. Circuit 1965).

In United States v. Alberti, 470 F.2d 878, cert. den. 93 S.Ct. 1557 (2nd Cir. 1972), this Court recognized that the mere fact that an attorney represented a defendant and had previously represented a government witness in an earlier proceeding, did not deny the Sixth Amendment right to that defense where that witness was not the only against defendant and where in fact the defendant was aware of the fact that the attorney represented both people. That case clearly set forth the rule in the Circuit that in these conflict situations prejudice may be found and it may be held that an appellant had been denied the effective assistance of counsel, but the interesting thing is that in all of these situations the appellant made a claim that his attorney should not have represented him. The case here where the defendant insists that he wants the attorney is a different situation and one which the Courts have never interfered with. (See also United States v. Mackin, 502 F.2d 429, cert. den. 95 S. Ct. 629 (D.C. Cir. 1974);

U nited States v. James, 505 F.2d 898, reh. den. 508 F.2d 942, cert. den. 95 S.Ct. 2397 (5th Cir. 1975); United States ex rel. Mitchell v. Thompson, 56 F.Supp. 683, S.D.N.Y. 1944) A similar case arose in the State of Pennsylvania where an attorney represented a defendant and co-defendants who had entered pleas of guilty and before being sentenced testified against the defendant. The District Court on a habeas corpus application in United States v. Myers, 253 F.Supp. 23 (E.D.Pa. 1966) held that the realtor had been denied his right to counsel, mainly because no evidence existed that he intentionally or knowingly consented to the arrangement. In the case at bar, appellant retained his attorney rather than having been given an assigned attorney. As in the Myers case, the the appellant specifically consented to the arrangement and expressed his desire on many occasions that he wanted his attorney to continue.

The State of New York holds similarly in treating these situations, and in People v. Wilkins 28 N.Y.2d 53 (1971) the Court of Appeals made it clear that considered that not even unknowing dual representation in no way itself required an attorney to step out and that the key factor in determining whether the right of a defendant had been violated is whether the defendant knew of and agreed to the situation.

It seems clear that if a defendant is ready to accept the pitfalls involved where his lawyer previously represented one who becomes a government witness, the Courts cannot substitute their judgment for that of a defendant. It is not even necessary to demonstrate prejudice because, after all, the choice of counsel is such a fundamental right that if prejudice were required that constitutional guarantee would clearly be diluted. Of course, in this case prejudice could actually be

found in the fact that the appellant was convicted. We may never know whether the result would have been the same if Mr. London had been allowed to continue representation, as Mr. London remarked that his reputation for cross examination was so widespread that he could have effected a different outcome. It also seems that upon the occasion of London's finally being withdrawn from the case, he did so by telling the Court that he wanted to be removed, that there was no question that the fact of the constant harping of the government that he be removed on each occasion that this case was heard in Court was the real reason he withdrew. London also revealed that he had conferred with the prosecutor and would testify that one of the defendants retained him in the Canate case, but that appellant had nothing to do with it. At that point, London suggested a severance for his client, and since the Court and prosecution could have easily solved the situation be agreeing to such a solution, this appellant should not have been forced to go to trial with another attorney. The record in this case clearly shows that Mr. Inniss involuntarily was required to secure other counsel and that his right to have the attorney of his choice represent him was interfered with.

POINT II

THE REBUTTAL TESTIMONY OF THE GOVERNMENT WENT FAR BEYOND PERMISSIBLE LIMITS AND SHOWED THE JURY OTHER CRIMES WITH WHICH APPELLANT WAS NOT CHARGED.

The record at bar shows that this prosecution rested almost entirely upon the testimony of Manuela Cortes-Canate, the alleged conspirator in the scheme to import narcotics who became a government witness. The facts are discussed in detail in Point III herein, but

suffice it to say at this point that almost every single piece of documentary evidence introduced in this trail was as corroborative of the defendant's testimony and of co-defendant McLenan's testimony as it was of the government's position. It therefore became necessary for thegovernment to support its position by calling Douglas Welch to the witness stand. As the facts in this brief show, Welch was a significant narcotics dealer who had a long arrest and prison record in the United States and Panama. He testified that he purchsed narcotics from appellant and McLenan on various occasions beyond the period covered in the indictment, and on some occasions within its scope (679-683, 684). Mr. Welch could have been called as a witness during the government's case, but it would seem that in that event many of these events beyond the period of the indictment would have been rendered inadmissible. By creating a false issue, that is the veractiy of Gertrude McLenan, the government successfully introduced Mr. Welch's testimony wtih respect to colalteral matters, when had this been attempted on the direct case it most certainly would not have been permitted. This was especially true, sicne Mr. Inniss did not testify and did not raise these issues, thereby creating the situation that on a veracity issue involving McLenan's testimony, Welch's evidence came in which directly implicated Inniss in narcotics sales other than those charged in the indictment.

Appellant recognizes that the Trial Court has great discretion in permitting the reception of rebuttal testimony, yet, it is equally recognized that rebuttal should only explain or contradict evidence offered in defense. United States v. Greenberg, 268 F.2d 120 (2nd

Cir. 1959); United States v. Crowe, 188 F.2d 209 (7th Cir. 1951).

Still, rebuttal which contains little value with reference to issues in dispute should never be permitted where it shows evidence of other crimes. United States v. Tramaglino, 197 F.2d 928, cert. den. 344 U.S. 864 (2nd Cir. 1952); United States v. Chiarella, 184 F.2d 903, modified 187 F.2d 12, reargument denied, 187 F.2d 870, vacated 341 U.S. 946, cert. den. 341 U.S. 956 (2nd Cir. 1950); United States v. Kahaner, 317 F.2d 459, cert. den. sub nom Corallo v. United States, 375 U.S. 835; Keogh v. United States, 375 U.S. 836, reh. den. 375 U.S. 926, 375 U.S. 82 (2nd Cir. 1963); Helton v. United States, 221 F.2d 338 (5th Cir. 1955).

In United States v. Kahaner, supra, at 471-472, this Court, speaking through Judge Friendly, said that although the scope of rebuttal is largely discretionary, a Trial Court should exclude evidence showing the commission of other crimes: "'Where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it'".

The statement of Judge Friendly applies even more aply to this case than the one concerning which it was made. To allow a witness to detail major narcotics transactions concerning which no charges were ever brought under the guise of relating it to a question as to whether the defendants knew what cocaine was, which was the specific issue under which this rebuttal was allowed, seems to destroy the major purposes concerning which rules of evidence are formulated. Inniss' attorney immediately objected to the relevancy of the testimony regarding these other transactions, and the Court recognized that the transactions were beyond the period of the indictment, but told the jury that it is only being

received on the question of whether the defendants were co-conspirators and whether they had a knowledge of cocaine (680). That seems to be a very flimsy basis upon which to admit testimony which was so damaging to the appellant.

POINT III

THE EVIDENCE BELOW DID NOT SUPPORT THE CONVICTION. THERE WAS ABSOLUTELY NO CORROBORATION OF ACCOMPLICE TESTIMONY, AND THE COURT'S REMARK THAT CORROBORATION EXISTED PREJUDICED THE DEFENSE.

The conviction in this case rested almost entirely on the testimony of Manuela Cortes-Canate, a prime mover in the conspiracy to import narcotics and one who may have been the real force behind the entire operation. As so common, it was not until after she was arrested and convicted that she became a cooperating witness and implicated appellant for the first time. We believe that a very significant factor that should be considered was that his own retained attorney testified that at the time he represented Canate when she was first arrested and discussed the proceedings with her, she said that Inniss was not involved in the conspiracy (626). This should be given great weight because it is the testimony of a respected member of the Bar and it should be assumed that generally people tell their attorneys the truth, especially people who are involved in criminal activity and who know that their conversations are confidential. Certainly, if a man can be convicted on the testimony of a person like Canate or on the testimony of the reubttal witness, Welch, another person whose background indicates he would lie at the slight provocation, the testimony of an

attorney should be given greater weight. It should not be presumed that an attorney would lie for any reason whatsoever. Mr. London's representation of Canate was short-lived, the fees he got were not very great, and even his representation of appellant was not very substantial. Appellant was also not someone who recommended many persons to the attorney, it being his testimony that one other matter had been referred to him.

Mr. London's testimony certainly corroborates the position of the defense that any relationship appellant had with any other participant in the conspiracy was innocent. One need not cite cases for the proposition that mere presence at the scene of a crime is not sufficient to convict someone, and it is equally true that a person can be with someone who is committing a crime and yet have no knowledge of any illegal activity. Certainly, the confidential communications of Canate with her attorney should be given greater weight.

Against this factor, the Court had to weigh the inherent unreliability of the testimony of the witness, Canate, and where there existed any type of corroboration for her story. The government introduced many documents into evidence, such as airline tickets, visa applications, visas, hotel bills and similar things. Not one of these items was more consistent with Canate's story that Inniss was involved in an illegal drug conspiracy than with the defense position that the people travelled together because of social and other reasons. After, it was conceded that both Inniss and McLenan had relatives in Panama, that they were in Panama during the Carnival

season and there was little doubt that McLenan's mother had been taken ill, causing her to leave the ship she was serving on in Europe to return to the United States. Only the birth certificate used by Canate is less ambiguous than the other materials, and even with respect to that, there was absolutely no proof that it was appellant who secured the certificate rather than McLenan, or even that if he did get the certificate he was doing it for a narcotics conspiracy purpose rather than just to help someone out who was interested in travelling to and from the United States. If a person seeks to travel with a forged passport, phony birth certificate or other improper documents, the person providing the document might be charged with that crime, but merely obtaining the material does not necessarily mean that the person knows about or participates in a narcotics conspiracy. It is highly significant that in this case Inniss was not even present when the narcotics were seized and when they were brought into New York. He had admittedly returned to Panama to see his family.

Even with respect to the other transaction, four or five months earlier, when no narcotics were seized whatsoever, Inniss was not present when the contraband was brought to New York, and even according to the prosecution he did not arrive in New York until a week later (85). The believability of that first transaction is also highly suspect, since the only proof that this substance was narcotics at all was testimony by Canate that Inniss had tasted it in Colombia and said that it was good.

It is realized that one can be convicted on the uncorroborated testimony of an accomplice, so it should also be realized that corrobora-

tion, if it exists, is a factor to be considered seriously. There really was no other evidence in this case which pointed directly to appellant, and since that was the case, the remark of the Court in its charge that: "Here there is corroborating testimony, at least with respect to details that the government has mentioned", (1084), is particularly harmful. It certainly conveyed to the jury that corroboration existed, which was certainly not the case, since that document evidently pointed equally to an inference of innocence as to one of guilt. The Court made two other comments which were not proper, in that it pointed out that Canate had less motive to lie at the time of the trial since her sentence was almost fully served (1084); and the Court also said, as a matter of fact, that appellant provided a falst birth certificate (1087-1088), a fact which had really not been proven.

The evidence certainly did not point to guilt with any great degree, and certainly the remark of the Court in its charge precluded the jury from properly evaluating the facts in an impartial manner.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED AND
THE INDICTMENT SHOULD BE DISMISSED.

Respectfully submitted,

PREMINGER, MEYER & LIGHT
Attorneys for Appellant
66 Court Street
Brooklyn, New York 11201

Dated: February 25, 1976

STANLEY M. MEYER
Of Counsel

APPENDIX

D. C. Form No. 100
CRIMINAL DOCKET

74CR 791

JUDD, J. A-1

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	AUSA
vs.	For U. S.: 743,659 R. DePetris
RICARDO INNISS, a/k/a "Ricky"	for deft. INNIS:
GERTRUDE MC LENAN, a/k/a "Peaches" and	Marvin Preminger
ROBERTO ALVAREZ	66 Court St. Bklyn, NY.
	834-8888
	For Defendant: MC LENAN
	Herbert Handman - 36 W. 44
	N.W. N.Y. 986-5460

Did import cocaine into the United States

ABSTRACT OF COSTS	AMOUNT
Fine,	
Clerk,	
Marshal,	
Attorney,	
Commissioner's Court,	
Witnesses,	

CASH RECEIVED AND DISBURSED

DATE	NAME	RECEIVED	DISBURSED
8-6-75	Notice of Appeal (Gertrude McLean)	5 -	
[illegible]	[illegible]		5 -
3-11-76	Notice of appeal (Roberto [illegible]	5 -	
3-11-76	Paid to Treas.		5 -

DATE	PROCEEDINGS
12-17-74	Before JUDD, J - Indictment filed ordered sealed by the Court. Bench Warrants Ordered and Issued for all defts.
1/31/75	Before JUDD,J.- Case called- Deft and counsel Ira London present- ~~RICARDO~~ ~~INNISS~~ Indictment ordered unsealed- Deft INNISS arraigned and enters a plea of not guilty- Govt's application for $50,000.00 bail argued- bail set at $20,000.00 surety bond plus $10,000.00 P.R.Bond- case adjd to 2/24/75 for trial
2/3/75	Benchwwarrant retd and filed- executed(INNISS)
2/4/75	Before JUDD,J.- Case called- Deft and counsel present- Deft McLenan arraigned and enters a plea of not guilty- deft to surrender by 2/11/75 Bail set in Boston at $30,000.00 Surety Bond secured by 10% cash- Bail conditions contd- Case adjd to 2/18/75 at 2:00 P.M. for conference and to 2/24/75 at 10:00 A,M. for trial

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74CR 791

DATE	PROCEEDINGS
2/4/75	Notice of appearance filed(McLENAN)
2-5-75	Before JUDD, J - case called - deft not present - counsel Ira London present - defts motion for reduction of bail - motion argued - motion denied. (RICARDO INNISS)
2/14/75	Affidavit of A.U.S.A. Fried filed
2-18-75	Magistrates proceedings filed redeft Gertrude McLenen received from Clerk , U.S. District Court, Boston, Mass. Acknowledgment mailed to Clerk for receipt of papers as listed on letter from Clerk, Boston, Mass. dated 2-12-75. (Bank Book 5 401769-4 re deft and U.S.Merchant Mariners Document of deft placed in vault)
2/18/75	Before JUDD,J.- Case called- Defts and counsel present-Govt's motion to disqualify Mr. London as counsel for deft Inniss- motion argued- decision reserved pending submission of further papers by 2/24/75- pre-trial conf. held and concluded- case adjd to 3/17/75 at 10:00 A.M. for trial
2/24/75	Magistrate's files 75 M 227 and 75 M 228 inserted into CR file.
3/3/75	Letter dated 3/3/75 filed from E. Korman to J. Judd
3/5/75	Affidavit of A.U.S.A. D. DePetris filed
3-14-75	Before Judd, J - case called - defts & counsels present -conference held and concluded - deft McLean motion to sever argued - motion denied case referred to Magistrate for any open discovery matters - adjd to 4-7-75 for trial.
3-20-75	Before SCHIFFMAN. Magistrate - Matters heard before Mag. Schiffman - Report submitted to Judge Judd with the file. (motions for discovery proceedings)
3/26/75	Notice of motion for discovery,inspection,etc. filed- Memorandum from Magistrate Schiffman and response of Govt to request of bill of particular etc. filed (McLenan)
4-7-75	Affidavit of IRA LONDON filed (recvd from Chambers)
4-7-75	Before JUDD, J - case called - defts present - counsel for deft McLenan present, Herbert Handman; counsel for deft Inness not present)Ira London) case adjd to 4-14-75 for hearing as to deft Inniss and for trial after conclusion of US vs.Cruz, 75 CR-130
4-9-75	By JUDD, J -Memorandum and Order filed on motion of deft Inniss to quash a subpoena; for discovery and one by the Govt to disqualify Ira London from representing the defts etc. It Is Ordered that the motion to quash the subpoena for defts passport be denied; that the report of the Magistrate concerning the discovery motion be confirmed; that Ira London be directed to file an affidavit by 4-11-75 stating who paid the retainer for him to represent Manuela Cortes-Canate and the date and

DATE	PROCEEDINGS
	amount of retainer, and the extent of his investigation in the matter before he submitted her guilty plea; and that a hearing be held in court at 10:00 A.M. on 4-14-75 at which Mr. Inniss shall be present and state whether he still wishes to be represented by Mr. London and that decision on the motion for disqualification be deferred until after that hearing.
4-14-75	Affidavit of IRA D. LONDON filed.
4-14-75	Before JUDD, J - case called & adjd to 4-21-75 at 10:00 am
4-21-75	Affirmation of IRA D. LONDON filed.
4-21-75	Before JUDD, J - case called - defts Inness & Gertrude McLenan present - adjd to 4-25-75 for hearing & to 4-28-75 for trial.
4-25-75	Before JUDD, J - case called - defts Inniss & Gertrude McLenan present - counsel for deft INNISS present, Ira London; counsel for deft McLenan not present - possible conflict of interest on be half of Mr. London to be resolved informally with Asst. U.S. Atty. David De Petris - Govts application to have deft Inniss' passport turned over to Clerk of the Court - Motion argued and motion granted - Deft Inniss' passport to be turned over to Clerk of Court as a condition of bail on 4-28-75 - case adjd to 4-28-75 at 10:00 am for trial.
4/28/75	Before JUDD,J.- Case called- Defts and counsel present-Deft McLenan's motion to ~~xxx~~ relieve Mr. Handman as counsel-motion denied- deft Inne passport and alien card turned over th court as directed as part of bail condition-court directs that passport and alien card be sealed in vault by theClerk-Case adjd to 5/13/75 at 10:00 A.M. for trial
5/7/75	Before JUDD,J.- Case called- counsel present-deft not present-Mr. Londo motion to be relieved as counsel-motion granted-deft INNISS to secure new counsel by 5/13/75
5-13-75	Before JUDD, J - case called - adjd to May 14, 1975 for trial
5-14-75	Notice of Appearance filed (INNIS)
5-14-75	Before JUDD, J - case called - defts & counsels present - Marvin Preminger submitted as counsel for deft INNIS - case adjd to May 19, 1975 for trial
5-19-75	Before JUDD, J - case called - defts & counsels present - deft McLenan's motion to have Govt turn over her work permit card - motion granted - adjd to July 7, 1975 for trial.
7/7/75	Before JUDD,J.-Case called Deft INNESS and MCLEAN present with counse Trial ordered and begun-jurors selected and sworn-trial contd to 7/8/7

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DATE	PROCEEDINGS
7/3/75	Before JUDD,J.- Case called- Defts and counsel present-Trial resumed- Trial contd to 7/9/75 at 10:00 A.M.
7/9/75	Before JUDD,J.- Case called- Defts and counsel present-Trial resumed Govt rests-defts motion to dismiss argued- motion denied-Deft Innis rests trial contd to 7/10/75 at 10:00 A.M.
7/10/75	Before JUDD,J.- Case called- Defts and counsel present-Trial resumed- Trial contd to 7/14/75 at 10:00 A.M.
7/11/75	Stenographers Transcript dated 7/7/75 filed
7-14-75	Before JUDD, J - case called - defts & counsels present - trial resumed - Both defts rest - Govt opens on rebuttal - Govt rests on rebuttal - trial contd to July 15, 1975.
7-15/75	Before JUDD,J.- Case called- Defts and counsel present-Trial resumed All sides rest- Defts sums up - Govt sums up- Trial contd to 7/16/75 at 10:00 AM.
7-16-75	Before JUDD, J - case called - defts & attys present - trial resumed - Govts summation contd - Judge charged Jury - Marshals sworn - alternates discharged - Order of sustenance signed - Jury retires to deliberate at 12:05 PM - Jury returns at 3:25 PM and renders verdict of guilty as charged on all counts as to both defts - Govts motion to have deft INNESS remanded - Motion argued and motion granted - Govts motion to increase bail of deft McLENAN - motion argued and motion granted - bail increased to $30,000.00 surety bond to be posted by July 18, 1975 at 12 Noon with condition that deft surrender her seaman's card to the Clerk of the Court. Case adjd to August 1, 1975 for sentence.
7-16-75	By JUDD, J - Order of sustenance filed (Lunch)
7-16-75	Stenographers transcript filed dated July 8, 1975 (pgs 103 to 271)
7-16-75	Govts Requests to Charge filed.
7/18/75	Before JUDD,J.- Case called- Deft McLenan present-Govt ounsel present- counsel not present-Deft's motion for reduction of bail granted on consent Deft's bail set at $20,000.00 surety bond plus $3,000.00 cash already in possession of Clerk of court in form of bank book- Bail tobe posted by 7/22/75 at 12:oo P.M.
7-29-75	Before JUDD, J - case called - deft McLenan present - AUSA David De Petris present - Govts motion to have Clerk of the Court release deft McLenan's Seaman's Card to AUSA De Petris granted on consent.
8-1-75	Before JUDD, J - case called - defts INNISS & McLENAN present with attys Deft INNISS sentenced to imprisonment for 8 years plus 5 years special parole to run concurrent on counts 1 and 3 pursuant to 18:4208(a)(2)with

DATE	PROCEEDINGS
	eligibility for parole after one year - deft advised of right to appeal - defts motion for setting of bail argued - bail set at $75,000 surety bond. Deft MC LENAN sentenced to imprisonment for 8 years plus spsecial parole term of 5 years to run concurrent- on counts 1, 3 & 5 pursuant to 18:4208(a)(1) with eligibility for parole after 1 year. Execution of sentence stayed pending appeal. Deft advised of right to appeal - bail conditions contd.
8-1-75	Judgment & Commitments filed for defts MC LENAN & INNISS - certified copies to Marshal
8/5/75	Judgment and Commitment retd and filed. Executed. (R. Inniss)
8-7-75	Notice of Appeal filed (MC LENAN)
8-7-75	Docket entries and duplicate of Notice of Appeal mailed to Court of Appeals (MC LENAN)
8-11-75	Notice of Appeal filed (INNISS)
8-11-75	Docket entries and duplicate of Notice mailed to C of A
8-21-75	Order filed received from the Court of Appeals that the Record be docketed on or before Sept. 2, 1975.

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DEFENDANT — EAS[illegible]

RICARDO INNISS a/k/a "R[illegible]" FILMED — 74 CR 791

COUNSEL — In the presence of the attorney for the government the defendant appeared in person on this date

MONTH	DAY	YEAR
8	1	1975

[ ] WITHOUT COUNSEL — However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

XX WITH COUNSEL — Marvin Preminger, Esq. (Name of counsel)

PLEA — [ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT — There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged; XX GUILTY. In Counts 1 and 3

Defendant has been convicted as charged of the offense(s) of violating T-21, U.S.C. Sec. 846, 963 841(a)(1) and T-18, U.S.C. Sec. 2, in that on or about and between February 1974 and June 1974 and on or about late March 1974, the defendant with others, did knowingly and intentionally combine, conspire, confederate, and agree to violate T-21, U.S.C. Secs. 841(a)(1), 952, and 960(a)(1), in that the defendant did conspire to knowingly and intentionally import into the United States, and did knowingly and intentionally possess with intent to distribute approximately 1 kilogram of cocaine, a Schedule II narcotic drug controlled substance.

SENTENCE OR PROBATION ORDER — The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 8 years plus a special parole term of 5 years to run concurently on counts 1 and 3 pursuant to T-18, U.S.C. Sec. 4208(a)(1) with eligibilty for parole after 1 year.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.
AUG 1 1975
TIME A.M. ....
P.M. ....

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION — In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMEN- — The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Mar[illegible]

interest in having determinations final.

THE COURT: The Court has an interest in not trying a case that may wind up with a reversal.

MR. LONDON: What would be --

THE COURT: If we could have Mr. Inniss come forward and give his ideas on the matter, that might help.

MR. LONDON: I fully discussed it with him. He is concerned only in that he wants me to represent him on this matter. He's aware of my prior relationship with Miss Cortes-Canata.

Judge, my suggestion was not facetious. Would you want me to give, let's say an in-camera deposition to you to start so that you have a factual foundation and would be willing to do that? I don't know what's wanted. I do know Mr. Inniss wants me to represent him. He's here to confirm that.

MR. HAMDMAN: In a normal case I would have no position here nor would I butt in, but in a conspiracy we're here and the type of testimony that might or might not tend to establish a relationship, I would not want any sort of in camera or any type of unusual procedure. I think if Mr. London is legally retained, can legally represent his client. Let him do so. If he can't, then he shouldn't do so. But I just

MR. DE PETRIS: Of course, your Honor will recall the case where you cited the Court of Appeals and reversed a defendant's conviction because those facts are the very circumstances that we have here.

THE COURT: What case is that?

MR. DE PETRIS: Taylor.

THE COURT: You cited Taylor?

MR. DE PETRIS: When your Honor was --

MR. LONDON: I don't see any Taylor case.

THE COURT: I think the only case you cited was the General Motors, which is a civil case.

MR. HANDMAN: If your Honor please, I could cite a case in which it was not reversed because United States v. Binhum which was some notoriety in the Southern District in which Mr. Evseroff was trial counsel for the defendant Binhum and had previously represented the Government in former witnesses, a fellow named Stuart and that was one of the points on appeal. It was raised in a post-trial motion and it was denied. It was raised on behalf of Binhum, claiming for a new trial to the Second Circuit. It was denied and it was argued to the Supreme Court and it was denied. The case was remanded on a wiretap issue.

THE COURT: A minimization case?

be permitted to make as many photostats as he wishes, but the Court maintain the integrity of the passport.

MR. DE PETRIS: I'm not exactly sure what that means.

THE COURT: Is that what you mean? I consider it might be safer in the Clerk's office as part of the security for Mr. Inniss--

MR. LONDON: That's what I'm asking for.

THE COURT: For his remaining here.

MR. DE PETRIS: I do intend to use it at trial.

MR. LONDON: For preparation for trial you need photostats.

MR. DE PETRIS: That's all.

THE COURT: It may have to go over-- The photostat could go over to the Court of Appeals should there be a conviction on appeal.

MR. LONDON: On the negotiation, I think I have resolved that issue. Have I, your Honor?

THE COURT: Yes.

MR. LONDON: On the next issue of conflict, Mr. Inniss and I have had extensive meetings, as a result of which Mr. Inniss will advise the Court himself that he wishes me to continue as counsel.

Before that's done, I wish to bring another case to your Honor's attention. People v. Wilkins, 320 N.Y.Supp.2d 8 (1971) case.

THE COURT: What court?

MR. LONDON: Oh, dear--

THE COURT: We'll get it.

MR. DE PETRIS: Either a Supreme Court--

THE COURT: Could be Court of Appeals. I don't know.

MR. LONDON: The issue in that case was very similar to what we have here. There were two Legal Aid lawyers from the same Legal Aid office representing the complainant and chief prosecution witness and the other Legal Aid lawyer from the same office representing the defendant.

The Court held as-- I really should have said at the outset, it offended me personally. That's why I had a slight hostility towards Mr. DePetris's office which no longer exists. The Court said unless we presume two attorneys from the same office are going to violate the canons of ethics and exchange information, there is no violation.

Well, you have to presume that, really, to presume that I would reveal anything that the

complainant, Government witness in this case, has told me.

THE COURT: It's not conclusive. Did we presume it here to the extent Legal Aid in this court will not represent any related defendant, even though they are different lawyers?

MR. LONDON: The only point of that case is that where an attorney follows his canons and observes them as-- well, I really think any trial attorney with any experience would, there is no violation.

I know that I can't reveal anything she's told me. In fact, just in preparation of today, I went through the file that I had on it. It hit me that the main thrust of the prosecution's charge involving Mr. Inniss does not relate to the case in which I represented Miss Canate. I represented her on the second importation. The first alleged importation is the one Mr. Inniss is involved with, although there is an overall conspiracy.

THE COURT: I see.

MR. LONDON: In any event, I discussed it with Mr. DePetris in the hall, and Mr. Inniss will assure the Court that he does not intend to use the potential conflict as any source for disqualify-

ing me as his attorney.

There are some other collateral--

THE COURT: I have the Wilkins case. It is the Court of Appeals. I could distinguish it because it wasn't as unknowing representation during the preparation of the appeal, Legal Aid discovered that one of their attorneys had represented the complaintiny witness in an unrelated criminal proceeding; but also it distinguishs between Legal Aid associates who are not exactly a partnership and members of a law firm where they do impute knowledge.

MR. LONDON: As to the collateral issue of the fee, I will sit down with Mr. DePetris and discuss that with him informally. I think we can resolve that. I do not wish at the trial of this matter to bring to the attention of the finders of fact that I at one time represented the Government witness. I think it's irrelevant and I think it would be prejudicial. I will sit down with Mr. DePetris to determine whether what he has said he wished to call me for, he does wish to call me.

MR. DE PETRIS: I don't know what the answers to my questions would be, so I won't know until after Mr. London and I have sat down.

of problems since January 31.

THE COURT: Let me find out from Mr. Inniss if he understands whatever problems there may be.

MR. LONDON: Mr. Inniss advises me he's walking around without any identification. That's his personal problem. A call to Mr. DePetris to verify the alien card is here.

MR. DE PETRIS: We can provide him with something which he would be able to identify himself with but which would not enable him to leave the jurisdiction.

THE COURT: Suppose you do that.

MR. LONDON: A letter from your office.

MR. DE PETRIS: I'll have that by Monday.

THE COURT: Mr. Inniss, you heard a lot of the discussion. I don't like people changing attorneys on the eve of trial, but in your case, if you want to do it, I'll let you do so. I said the fact that you may have paid a retainer to Mr. London should not deter you from doing what's in your best interest in the defense of this case.

Do you want Mr. London to represent you?

DEFENDANT INNISS: Yes.

THE COURT: Miss McLenan, be here with Mr. Handman Monday morning.

questions I asked Mr. London indicates that one of the defendants did retain Mr. London to represent Manuella Canate. It's certainly relevant and material to the case, which is scheduled to to go trial.

THE COURT: There's Inniss and McLenan.

MR. LONDON: Inniss did not. That's my client.

THE COURT: I suppose this is not a case where there's much basis for severance. I've tried to keep the two together. You're going to have the same defendants.

MR. DE PETRIS: Cases would take equally long as against each defendant. It's clear it was a conspiracy involved between these people. I don't think it would be appropriate at all for a severance in this case.

MR. LONDON: If there is a severance, I would stay in.

THE COURT: If you're representing Mr. Inniss, if you're called with respect to the case against McLenan, I think it would be prejudicial to him.

MR. DE PETRIS: The association becomes very strong then.

A-15

morning, your Honor.

THE COURT: Is she here?

MR. DE PETRIS: I don't believe so, your Honor.

THE COURT: Would you have her brought over?

MR. DE PETRIS: Yes.

THE COURT: Let's see what comes up.

MR. DE PETRIS: I am not sure whether there is any---

MR. HANDMAN: Let me say this---

THE COURT: The fact of retainer is not a privileged matter. I have ruled on that.

MR. HANDMAN: I believe she testified on various orders, of when Mr. London was here and about the plea and whether she decided to cooperate. And I think her testimony itself waives the privilege she may be entitled to exercise.

So I will argue she does not have to do anything further. Her affirmative testimony on direct examination and on cross-examination served to waive her privilege.

MR. PREMINGER: Why are you arguing?

A-15

The Judge said there is no question of privilege.

MR. HANDMAN: As to the retainer and not a conversation.

THE COURT: That's a different matter.

If Mr. London says there is nothing of substance, I haven't studied that.

MR. PREMINGER: Concerning her, but there were other conversations.

THE COURT: What are the questions you contemplate asking?

MR. HANDMAN: I contemplate asking Mr. London if he asked questions of Miss Cunate and what did you say to her and what did she say to you.

MR. DE PETRIS: Do you know the answers at the present time?

MR. HANDMAN: I don't know it.

MR. DE PETRIS: There may be a question as to whether Mr. Handman had discussed it with Mr. London.

THE COURT: He said no.

MR. HANDMAN: I asked if he had a discussion and he said no.

07-17

MR. PREMINGER: Wasn't it the basis of Mr. London to be excluded from the case in the first place because we may have to testify concerning the dealings of Miss Cunate and him?

THE COURT: One of the reasons he was not called is because I permitted Miss Cunate to testify as to what he says are the sources of the funds.

MR. DE PETRIS: Which is not a question of privilege to begin with.

I don't kn ow, your Honor, I don't know what is the---

MR. HANDMAN: There is no reason why we can't call Mr. London to state a conversation with this witness. I don't see the question. And if she chooses to come out here in court and invoke the privilege, that's it. I think she has waived it already. I don't think she can legally do it.

And I may add, Mr. DePetris doesn't represent her and I don't know whether it's proper for him to counsel her with regard to her privilege.

THE COURT: And that occurred to me, that

you might need her lawyer here.

MR. DE PETRIS: I believe it's Mr. Kelly.

THE COURT: Yes, she was represented by Mr. Ed Kelly.

(Whereupon an unrelated matter is discussed in open court.)

MR. DE PETRIS: Your Honor, I understand that Manuela Cunate is downstairs.

THE COURT: I see.

Counsel, Juror #1 overslept and is just about to leave his house, 2600 East 28th Street, which is out near Manhattan Beach, I would think.

MR. PREMINGER: It's a half hour ride by the train.

THE COURT: It would be at least a half hour before he gets here. Shall we proceed without him and put in a substitute or shall we adjourn?

We are holding Mr. London.

What are your engagements, Mr. London?

A VOICE: I have two matters---

THE COURT REPORTER: Please state your name.

THE VOICE: Ira London.

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I have two matters on in the State Court. I can just tell the judge there I am engaged before you. It's nothing that would tie me up.

THE LAW SECRETARY: Mr. Kelly is in.

THE COURT: Mr. Kelly, you represented Manuela Cortez-Cunate?

MR. KELLY: Yes.

(Mr. Edward Kelly of the Legal Aid Society.)

THE COURT: She testified here as a Government witness and she testified among other things that Mr. London came to Rikers Island and said he had been hired to represent her. And now the question is whether there is any attorney-client privilege with respect to questions that the defense counsel may ask him about conversations with her during the period he represented her.

MR. KELLY: Yes.

THE COURT: Since she is a Government witness and has been sentenced, I don't know how far the attorney-client privilege prevails.

MR. KELLY: There may be some doubt as to what she told Mr. London under the privilege?

THE COURT: Yes.

MR. KELLY: I see.

THE COURT: Have you any views on it?

MR. KELLY: I think a Notice of Appearance was filed by Mr. London in this case.

Isn't that right, Mr. London?

MR. LONDON: Yes.

THE COURT: Yes, but the question is when she agreed to cooperate and by cooperating she has waived any privilege with respect to things she told Mr. London while he was her attorney.

MR. KELLY: I wouldn't think so, your Honor.

THE COURT: You would not think it was waived or you would not think it was a privilege?

MR. KELLY: I think it was a privilege of everything she told Mr. London, unless and until of her own accord she reveals what had transpired between her and Mr. London. At that time I think she would be waiving her own

privilege.

THE COURT: Suppose she said something on cross-examination when nobody bothered to consider whether she had a lawyer. You see, she was cross-examined by both counsel after testifying on direct examination as to the source of Mr. London's retainer. She was cross examined with respect to discussions of cooperation and when they began.

We are waiting a few minutes for a juror anyway, so I think this is the time to consider it.

MR.KELLY: I would think if she was asked about cooperation and she gives some information as to when that cooperation began, merely in connection with some conversations she had with Mr. London, I would think she has to answer those questions.

I mean, it's a legitimate vehicle for defense attorneys to find out when cooperation began. Because I guess your point is if she started answering these questions about cooperating, that it had something to do with

the attorney-client privilege.

Now, without counsel being present, does that present a problem?

THE COURT: Yes. It didn't occur then to go into the limits, but there has been discussion about possible cross-examination of Mr. London when called.

MR. KELLY: I don't know. I see the problem. I suppose if she didn't when she was asked about when the cooperation began, at point recall that they were said in--while Mr. London was her attorney, and she had come forward with the information and in a sense waived her privilege.

THE COURT: All right.

I have a call in chambers I have to take, so take ten minutes to think about it and we are still waiting for the juror. We told the jurors that they have ten or fifteen minutes.

(A recess is taken.)

(Court is resumed and an unrelated matter is discussed on the record.)

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(The witness, Manuela Cortez-Cunate, is produced in the courtroom.)

THE COURT: You may be seated.

Swear in the interpreter.

THE CLERK: Raise your right hand, please.

(The interpreter, Libya Clancy, is sworn to interpret the following:)

THE COURT: Let me explain, we have Miss Cortez-Cunate here because the defense have asked Mr. London to testify as a witness and his testimony for them may involve some conversations with you which go beyond the amount of the facts of retainer and on which you might--there might be a question of the privilege of the client not to have an attorney testify with respect to their communications.

Since you have been already sentenced I don't see that there is any privileged involved that would be of substantial importance to you, whether or not it exists.

So I have asked Mr. Kelly, who represented you at the sentencing, to come over and consult with you.

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Mr. Kelly, in view of the cooperation I have some questions of whether it is appropriate to invoke the privilege and I wonder if you had an opportunity to talk to Miss Cortez on it.

MR. KELLY: I have spoken to her and as a result of that conversation Mrs. Cunate is willing to waive any attorney-client privilege when she spoke to Mr. London and to allow Mr. London to answer fully any question with respect to the communications which took place between him and herself. And she is then waiving any privilege she might have , assuming there was any privilege.

THE COURT: Is that right what Mr. Kelly has said?

THE WITNESS CORTEZ-CUNATE: Yes.

THE COURT: In other words, you are willing for Mr. London to answer questions which were asked about conversations with you?

THE WITNESS CORTEZ-CUNATE: Yes.

THE COURT: All right.

Thank you.

That's all we need.

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Q And did that trial practice or does that trial practice encompass representing defendants in criminal matters?

A Yes, it does.

Q Now, did there come a time when you met an individual named Manuela Cortez-Cunate?

A Yes.

Q And did you represent her?

A Yes.

Q Can you tell us, please, the circumstances which led to your meeting with Miss Cortez-Cunate?

A Yes.

I received a call from a Miss McLenan who advised me that she had been recommended by somebody. She came to my office. She told me that a friend of hers had been arrested coming into the United States and that the friend's family and friend had gotten together and wished to retain me to represent her, that she had had a Legal Aid Lawyer up to that time.

I told her I would look into it before I would take the case.

I did look into it and determined she did have

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A Yes.

Q And did you have any conversations with Miss Manuela Cortez-Cunate with regard to Miss Gertrude McLenan or Mr. Ricardo Inness?

A With regard to Miss McLenan I did.

Q Will you tell us please what those conversations were.

A Well, when I came in I realized that she did not know who I was. And in addition to that, being an alien would have some feeling of insecurity, so I told her that Gertrude McLenan had come to me about representing her, that Miss McLenan had told me she raised some money from a friend and I believe a sister in Panama, I believe, and that they wished I represent her.

And she seemed pleased someone took an interest in her. And from that point on we discussed the facts of her arrest and everything else.

Miss McLenan's name came up once later. I asked her whether Miss McLenan had anything to do with what she was charged with and she said no, she did not. And I pursued it because it appeared at some point that Miss McLenan might have been on the

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months prior to the time you became engaged in this case?

A Yes.

Q Or even knew about the case?

A Yes.

Q Now, in discussing the case with Miss Cunate did you ask her to tell you the facts and circumstances concerning her involvement in this case?

A Yes.

Q And did you ask her to state places and people she went with and the different things she did?

A Yes.

Q Did she at any time tell you that Mr. Inness was involved with her in any of the dealings with regard to the indictment?

A She did not.

Q Did she ever tell you that she was present in March when she made arrangements to make a buy in Colombia?

A She told me nothing about that.

Q Did she ever tell you that she was ever

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present when she saw him taste a quantity of cocaine or alleged cocaine and say it's good stuff?

Did she ever tell you that that happened?

A No.

Q So that I understand your testimony, Mr. London, she didn't indicate that Miss McLenan was there either, did she?

A She told me Miss McLenan had nothing to do with this. I would not have represented her if I thought that. Because I couldn't have Miss McLenan retain me to represent her if Miss McLenan were involved according to what she told me. So that was resolved right at the outset in my conversation with her.

Q Now, sometime thereafter did Miss Cunate plead guilty in this case?

A Yes, she did.

Q And were you her attorney at that time?

A Yes, I was.

Q And do you remember when that was?

A I do not.

Would you give me a moment?

Q Would your record indicate?

A $350.

Q When you made these purchases on credit, how long would it take before you would pay for the cocaine which you purchased?

A Probably a week, probably five days.

Q And when you made payment, to whom did you make payment?

A I would make payment to Peaches most of the time.

Q When you say Peaches, who are you referring to?

A The girl.

Q Gertrude McLenan?

A Yes.

Q You say most of the time you made payments to her. Were there occasions you paid somebody else?

A Yes.

Q And whom did you pay?

A Her boyfriend.

Q Who is that?

A Rick.

Q Ricardo Imess?

A Right.

Q Now, were there occasions in 1973 when you made purchases from Ricardo Inness?

A Sometimes.

Q And what quantities would you purchase from Ricardo Inness?

A Same amount.

Q Quarter pieces and half pieces?

A Same amount.

MR. PREMINGER: I object to leading the witness, your Honor.

THE COURT: No. I have ruled on this. I will permit it.

I might tell the jury that Mrs. McLenan and Mr. Inness are not on trial for anything that occurred in 1973. The testimony is received in order for its bearing on questions like them being co-conspirators or the knowledge or the lack of knowledge as to cocaine which was being brought into the country. And the verdict will be whether they will be guilty of conspiracy in 1974.

Q Now, on these occasions when you purchased cocaine from Ricardo Inness, did you meet with him first?

A We speak downstairs.

Q Downstairs from where?

A Sterling.

MR. PREMINGER: May we know the dates that this happened?

THE COURT: See if you can't give us a date.

Q Can you tell us the exact date you made these purchases in 1973?

A No.

Q Did you keep any books or records?

A No.

Q But it was some time during 1973. Is that correct?

A Yes.

Q Was it--can you recall whether it was in the beginning of 1973, the middle of 1973 or towards the end or was it all during 1973?

A Say from about the summertime.

Q Summertime of 1973?

(The witness nods.)

Q Now, when you made these purchases did you also buy from Ricardo Inness on credit?

Q-32

A Also.

Q And how did you make payment? To whom?

A I paid either one of them.

Q When you say either one of them, who are you referring to?

A The girlfriend.

Q When you say the girlfriend, are you talking about Gertrude McLenan?

A Yes, that's right.

Q Can you recall approximately how many times you purchased cocaine from Gertrude McLenan in 1973?

MR. PREMINGER: I will object, your Honor.

A I can't remember that.

THE COURT: Overruled.

Q Was it more than two or three times?

A It could be, yes.

Q And approximately how many times did you purchase this cocaine from Ricardo Inness in 1973?

A Average of the same time. If it's ten times here, it's ten times the other way.

Q-32

Q Could it be more than ten?

A No, probably could be less.

Q Somewhere between five and ten times?

A Yes.

Q Now I direct your attention to February 1974.

Where were you in February 1974?

A I was here part of the time and the rest of the time I was in Panama.

Q What was the purpose of your travelling to Panama?

A For the carnival.

Q And was that the carnival in Panama City?

(The witness nods his head.)

THE COURT: You have to speak.

THE WITNESS: Yes, other than Panama, Colombia.

Q While you were at the carnival in Panama in February of 1974, did you see either of the defendants?

A I saw both of them.

Q And where was it that you saw them?

little less, maybe.

(A recess is taken.)

(The jury enters the courtroom and the following takes place in open court and in the presence of the jury.)

THE COURT: We are missing one lawyer.

THE CLERK: Here he is.

J U D D, U.S.D.J.

(THE COURT CHARGES THE JURY AS FOLLOWS:)

THE COURT: The people at counsel table and Mr. Weiner and members of the jury:

My remarks are directed primarily to you. You have heard the evidence and the arguments of counsel and it is now my duty to give you instructions as to the law which is to be applied in judging this case.

You have been attentive and patient. We have had about four and a half days of testimony and a solid day of argument as to what the testimony means. And now you are about to come to the decisive point where you determine where the truth lies in the case as best as humans can do it.

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Charge

In my instructions I will apply first the general principles that apply to all criminal trials, then the nature of the charges in this case, and then the specific rules of law that apply to those charges and something about how to evaluate the evidence you have heard, a few comments on the evidence briefly, and finally something about how you should reach a verdict.

In our adversary system of criminal justice it is the duty of the prosecutor to do his best to present the Government's case. And defense counsels' duty is to do their best to represent their own client's interests.

The Court and the jury are supposed to be impartial. The Court enforces the rules of evidence and the jury decides the truth or falsity of the testimony and the inferences that should be drawn from the evidence.

It is your duty as jurors to follow the law as I describe it in my instructions and to apply those rules of law to the facts as you find them from the evidence in the case.

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You are the sole judges of the facts.

You are to perform your duty without bias or prejudice for or against any party or any witness. The law does not permit jurors to be governed by sympathy or prejudice or public opinion.

The law presumes that a defendant is innocent of crime and the law permits nothing but legal evidence presented before a jury be considered in support of a charge against an accused. The presumption of innocence is enough in and of itself to acquit a defendant, unless twelve jurors are satisfied beyond a reasonable doubt of the guilt of the individual defendant on a particular count from all the evidence in the case. And the Government has the burden of that proof.

I will just say a few words about what the law means by a reasonable doubt.

We start with the words, a reasonable doubt is a doubt based on reason and common sense. It may arise from the state of the evidence or it may arise from the absence of

evidence. A reasonable doubt does not mean that a doubt that a juror asserts arbitrarily and capriciously because he doesn't want to undertake an unpleasant task. It doesn't mean beyond a possible doubt. It is rarely possible to prove anything to an absolute certainty and the law doesn't require this.

What is sometimes used as a way of defining it is that proof beyond a reasonable doubt refers to the type of doubt that would make you hesitate to act in your own important affairs.

This proof beyond a reasonable doubt operates on the whole case. It doesn't mean that each bit of evidence must be proved beyond a reasonable doubt. It means that when you consider the sum total of all the evidence, if you are satisfied beyond a reasonable doubt as to each element of the crime charged, you must convict. And if you have any reasonable doubts to any element as to any count you must acquit. And I will tell you about the elements of the counts shortly.

Finding a person to be guilty of a felony

and subjecting him or her to criminal penalties is serious and you will consider this fact in determining whether you have a reasonable doubt. Nevertheless, if you are convinced beyond a reasonable doubt of the defendant's guilt you should find him guilty and not be swayed by sympathy.

An indictment is just a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused and it does not create any inference of guilt.

The defendants have both pleaded not guilty. The indictment and these pleas create the issues which you must decide.

The law never imposes a duty on the defendant in a criminal case to produce any evidence. A defendant may present himself as a witness, as Miss McLenan did in this case. In that event she becomes subject to cross-examination as you have observed, and her credibility is for you as the jury to determine in the same manner as other witnesses.

You may consider that a defendant has a strong motive to lie to protect herself, but

you may also consider there is a real risk in subjecting herself to cross-examination. So you determine how much of the testimony you believe.

The fact that Mr. Inness did not testify does not create any inference. He has a right to rely on his counsel's belief or his belief that the Government's case leaves at least a reasonable doubt as to his guilt. And you can't even talk in the jury room about the fact that he did not testify.

We have two separate cases and each defendant may handle their case as they see fit.

I am going to read the indictment in this case so that you have the precise thing that were charged, although as I say, this is only the charge.

Count one charges that on or about and between February 1974 and June 1974 within the Eastern District of New York and elsewhere--and the Eastern District of New York is also Brooklyn, Queens, Long Island and Staten Island--the defendants Ricardo Inness, also known as

Ricky, Gertrude McLenan, also known as Peaches, and Roberto Alverez together with Manuela Cortez-Cunate and Maria Fernandez, herein named as co-conspirators but not as defendants, and others known and unknown to the Grand Jury did knowingly and intentionally combine, conspire, confederate and agree to violate Sections 841, 952A and 962A of Title 21 of the United States Code..

And then the descriptions, one, it was part of said conspiracy that defendants and co-conspirators would knowingly and intentionally import into the United States from places outside thereof substantial quantities of cocaine, a schedule 2 narcotic drug and controlled substances; and, too, it was part and party of a said conspiracy that defendants and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute substantial quantities of cocaine; three, it was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the conspiracy and would take steps to

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design and to prevent disclosure of their activity.

In furtherance of the conspiracy and to effect the objects thereof the following overt acts among others were committed within the Eastern District of New York and elsewhere.

One, on or about February 19th, 1974, the defendants Inness and McLenan met with co-conspirator Cortez-Cunate in Panama; and, two, on or about March 6th, 1974, the defendants Inness and McLenan and co-conspirator Cortez-Cunate travelled from Panama to Barranquilla, Colombia; three, on or about March 6th, 1974, the defendants Inness and McLenan and co-conspirator Cortez-Cunate met with defendant Alverez and co-conspirator Fernandez in Barranquilla, Colombia; four, on or about March 12th, 1974, the defendant Alverez delivered approximately one kilogram of cocaine to the defendants Inness, McLenan and co-conspirator Cortez-Cunate; five, in or about May 1974 the defendants Inness and McLenan met with co-conspirator Cortez-Cunate in Brooklyn, New York;

six, in or about late May 1974 the defendan A-42
Alverez delivered approximately one kilogram of cocaine to co-conspirator Cortez-Cunate and Fernandez in Barranquilla, Colombia; seven, on or about the first day of June 1974 the defendant McLenan and co-conspirator Cortez-Cunate arrived at John F. Kennedy International Airport, Queens, New York.

And I omit the counts dealing with Mr. Alverez and I read count three which we call a substantive count.

On or about late March 1974 within the Eastern District of New York the defendants Ricardo Inness also known as Ricky and Gertrude McLenan did knowingly and intentionally possess with intent to distribute approximately one kilogram of cocaine, a schedule two narcotic drug controlled substance.

And here the reference is to Title 21 of the United States Code, Section 841A-1, and also to Title 18, United States Code, Section 2.

And the final count charges that on or

about the first day of June, 1974, within the Eastern District of New York the defendant Gertrude McLaman also known as Peaches and co-conspirator Manuela Cortez-Cunate did knowingly and intentionally import approximately one kilogram of cocaine into the United States from Panama.

Now, the dates, and the amount in the indictment don't have to be accurate. They may be approximate, as long as they afford the defendants sufficient information so that they can prepare for trial. And similarly the fact that the overt acts in the indictment describe delivery of cocaine as taking place in Barranquilla instead of Cartegna, Colombia, is not a material variance. If you find that cocaine was in fact received, it would be all right in either place.

The conspiracy count is based on Section 846 as well as Section 841 of the Drug Abuse Control Act which says that any person who attempts or conspires to commit any offense defined in this sub-chapter is

punished by imprisonment, fine or both, which may not exceed the maximum punishment prescribed for the offenses.

And one Section of the chapter is Section 841A-1, which says, except as authorized by this chapter it shall be unlawful for any person knowingly or intentionally to manufacture, distribute or dispense or possess with intent to manufacture, distribute or dispense, a controlled substance.

Controlled substances are defined in Chapter 812 of Title 21 of the United States Code, and that includes as a controlled substance coca leaves (phonetic spelling) and salt compound derivative or preparation of coca leaves. Cocaine is made from coca leaves which should not be confused with coco leaves, which are two different plants.

The word distribute in the statute is also defined to be delivered. So the statute defines distribute not simply delivered to persons who sell cocaine in the streets to a lot of people, but to those who turn over

any quantity of a narcotic drug or a forbidden substance to another person.

And the indictment also refers to Section 952, which says it shall be unlawful to import into the United States from anyplace outside thereof any controlled substance in Schedule 1 or 2 of Subchapter 1 of this chapter.

And then Section 960 says that any person who contrary to Section 952 knowingly or intentionally imports or exports a controlled substance shall be punished as provided in Sub-Section B of this section.

You have heard a bit about what the potential penalties are and I will not review them now because that is a matter for the Court to decide on the basis of a presentence report and further appearances by counsel if there is a conviction. It is not a concern of the jury.

I referred also to Section 2 of Title 18 of the United States Code which is mentioned in the second and third count of the indictment. That says that whoever commits an offense

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against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal. That means that someone who helps in the commission of a crime is just as guilty as the one who does it himself. Someone who helps to import or possess or distribute cocaine is just as guilty as if he had done it himself. But helping means helping and conspiracy means conspiring. It does not mean just being around the place where the crime taken place. There is an obligation if you are aware of the commission of a felony to report it to the authorities. But that is not what anybody is charged with here in order to be guilty of conspiring or aiding and abetting.

A phrase frequently used, someone must have a stake in the venture. He or she must want to see the offense committed and must do something to help it take place affirmatively.

Now, the indictment alleges and the statute requires it to allege that the offenses here were committed knowingly and

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intentionally.

An act is done knowingly if it is done voluntarily and not because of mistake or accident or other innocent reason.

The word intentionally pretty well overlaps knowingly. The purpose of the word knowingly is to insure that no one will be convicted for acts done because of mistake or accident or other innocent reason.

The transaction is not intentional unless it is knowing.

The first count of the indictment refers to conspiracy. And in connection with such a charge there are three essential elements which must be established.

First, that there was an agreement to import or distribute cocaine; second, that a particular defendant willfully became a party to that agreement; and third, that some member of the conspiracy did some act in furtherance of the conspiracy.

Only one overt act is necessary in order to establish that. It doesn't matter which conspirator did it as long as it is pursuant

to and in the existence of an agreement between individuals to violate the law.

The agreement does not have to set down in writing. It does not have to be explicitly set forth because conspirators act to some degree in secret. And you can infer the agreement exists from the evidence in the case or you can infer the agreement does not exist.

It is not necessary that a conspiracy be successful. The doing of a conspiracy or performance of an act--and some of the acts you may well know are innocent acts as travelling from Panama to Colombia, which is separate from the receiving of cocaine.

So as a matter of law if the parties thought they were buying cocaine and they thought they were going to distribute cocaine in the United States after they got it here, it does not matter that there is no chemical analysis to show that the package alleged to have been brought in in March of 1974 was in fact cocaine. The question is whether there was a conspiracy to bring in cocaine.

With respect to the second count, which is possession with intent to distribute, there are two types of possession, what is called actual possession and constructive possession.

Miss Conate--I think that is her surname under the Spanish tradition--had the cocaine in her possession in June. She said she had it almost all the time except when she alleges that Miss McLenan brought it across the border on the first venture so that it wouldn't be lost if the illegal immigrants werecaught at the border.

Having it in your hand or in your pocketbook with you is in actual possession. Having power to tell somebody who has the actual possession how to dispose of it or what to do with it is what we call constructive possession.

So if Miss McLenan was holding it for the benefit--if Miss Cortez was holding for the benefit of Miss McLenan or for the purpose of Mr. Inness being able to sell it, they may have had constructive possession of it within the meaning of the second count being

submitted to you on the indictment.

With respect to the third count--oh, with respect to intent to distribute, when there is a substantial amount of cocaine more than one person is likely to use for his own personal needs, you may infer that there was an intent to pass it along to somebody else, an intent to distribute. You need not infer such an intent. That is within your power.

With respect to the third element, the third count that is being submitted to you, importation, there are two elements: First knowledge that the substance was cocaine.

And on the third count it is important that the Government prove beyond a reasonable doubt that it was cocaine.

And second, that it was brought into the United States or attempted to be brought into the United States.

And here there is evidence that the exhibit 1, I guess it is, the package of cocaine, lidocaine and lactose was brought at least so far as the customs tables at John F. Kennedy Airport.

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There has been discussion about the legality of lidocaine. That is not a basic element of the charge. But it goes to some of the collateral issues that were discussed at the trial.

And the New York Law since 1971 has said that a person is guilty of criminally using drug paraphernalia in the second degree when he knowingly possesses or sells diluents, dilutants or adulterants, including but not limited to any of the following: quinine hydrochloride, mannitol, mannite, lactos or dextrose, adapted for the dilution of narcotic drugs or stimulants under circumstances evincing an intent to use, or under circumstances evincing knowledge that some person intends to use the same for purposes of unlawfully mixing, compounding, or otherwise preparing any narcotic drug or stimulant.

Lidocaine is not specifically mentioned in that section and it was possible that the witnesses were in some honest disagreement as to whether the section covered lidocaine

or not. The evidence here is that it was used as a dilutant in the cocaine that was seized on the June venture. A-52

The burden is on the Government to prove each of the essential elements of a count beyond a reasonable doubt. You can't infer the existence of one element from the fact of another element proved.

This burden rests on the Government throughout the trial and never shifts on the defendant. If you have a reasonable doubt as to any element of any count you must acquit, just as you have a duty to convict if you are persuaded beyond a reasonable doubt.

Now, some rules on evaluating evidence.

There are, generally speaking, two types of evidence from which a jury can find the truth of facts in a case. One is direct evidence like the testimony of an eyewitness. The other is indirect or circumstantial evidence, which is the proof of a chain of circumstances that logically point to the existence or non existence of certain facts.

Example of direct evidence in Miss

Cortez' testimony that she handed cocaine to Miss McLenan and that she had it with her in the apartment.

And then Miss McLenan's testimony that she never had any cocaine in her possession and knew nothing about it.

Examples of circumstantial evidence are the fact that the Mexican visas were all obtained together after the cocaine had been purchased in Colombia and the fact that there was a birth certificate of a Mrs. Perez used by Mr.--by Miss Cortez, and Miss Perez had at one time travelled into the United States with Mr. Inness, if you believe the evidence.

And contra, the fact that Mr. Inness was going to Panama for the carnival and as a matter of fact Ash Wednesday in 1974 was on March 27th, I think. So a few days before there was the carnival and it may be some evidence he was not going to buy cocaine.

And the fact that Miss McLenan was on the ships in June, July or August in 1973 maybe some circumstantial evidence that she did not

sell cocaine to Mr. Welch during the time they said he did.

You can sometimes draw more than one inference from a particular piece of circumstantial evidence. And it is up to you to decide which inference is most logical in the light of all the other evidence in the case.

As a general rule the law makes no distinction between direct and circumstantial evidence. Circumstantial evidence need not exclude every reasonable hypothesis of innocence in order to establish guilt. What is necessary is that a jury be satisfied of a defendant's guilt beyond a reasonable doubt on the basis of all the evidence in the case, both direct and indirect, or else you must acquit.

Circumstantial evidence may be enough to convict all by itself if you find the defendant guilty beyond a reasonable doubt on the whole case.

When you are analyzing the evidence including the circumstantial evidence you can

intelligence as you have observed it, the probability or improbability of their testimony in relation to other testimony in the case.

You can consider also the extent to which any testimony has been corroborated or contradicted by other credible evidence. You may consider inconsistencies within the testimony of any witness, either on direct or cross-examination, and whether any witness has changed his testimony.

If you are convinced that a witness has lied you can say you won't believe anything the witness has said or you can say that part of what the witness said is true and part is not. And the same thing with respect to inconsistencies.

A witness may have been mistaken or untruthful with respect to part of the testimony and be correct with respect to other parts. That's for you to determine.

And when it comes to inconsistencies or facts which you think were not truthfully stated you should consider whether they

relate to a detail or to an important part of the testimony.

You can consider your own experience with the extent to which repetitions of the same story or descriptions of the same event by more than one person may vary in detail and whether such variations indicate falsehood or inaccurate memory or have some other explanation.

Imagine yourself sitting on the witness stand trying to say what happened during your last vacation trip during 1974 and whether you can get all the sequences of events straight, bearing in mind the burden of proof beyond a reasonable doubt is on the Government.

You can evaluate the testimony of a defendant, consider her personal interest in the result of the case. Also consider that no one else but Miss McLenan could say what happened during the times when she was with Miss Cortez. And apply to Miss McLenan's testimony all the same tests such as credibility which you use in judging other

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witnesses.

We have had some Government Agents here. There is a rule with respect to them, that you are not to give any greater weight or credibility to the testimony of a witness solely because of the fact that he is a Government Agent. And you don't give it any less on that account. You evaluate the testimony of the Government Agent in the same way as you would evaluate the testimony of other witnesses.

There are special rules with respect to what are called accomplices, which include Miss Cortez and Mr. Welch.

An accomplice is somebody who has participated in the crime that is on trial.

The law does not prohibit the testimony of accomplices or whether you approve of their use is not to enter into your considerations of the case.

In certain types of crimes the Government is frequently compelled to rely on the testimony of accomplices or persons with criminal records. It has to take the witnesses

to the transaction as they are. There is no requirement that the testimony of an accomplice be corroborated. A conviction may rest upon the uncorroborated testimony of such witness if it is found credible beyond a reasonable doubt.

Here there is corroborating testimony, at least with respect to details that the Government has mentioned. But an important rule is that the testimony of an accomplice should be viewed with great caution and scrutinized carefully before you determine whether to accept it. And that applies to both Miss Cortez' testimony and to Mr. Welch's testimony.

You can also consider the question of motivation.

Miss Cortez may have had a motivation to implicate Miss McLenan and Mr. Ricardo Inness at the time she was cooperating with the Government. She has less now because she is sentenced and knows what will happen to her.

Mr. Welch is awaiting sentence and he

may have a motive to help the Government. You may consider that in determining the extent you wish to give to the credibility of both of them.

It is a serious thing to lie somebody else into jail and you should determine as to whether each of these two witnesses were in fact doing that.

A couple of other things which I think you should consider in this connection: We don't believe in this country in guilt by association. And the fact that Mr. Inness or Miss McLanan were with Miss Cortez at various times is not in itself enough to prove guilt. It may create inferences which leads to your finding that there is conspiracy or that there is aiding and abetting. But mere presence is not sufficient.

Now, there was discussion about why the passports were made available.

The law in the United States as I have ruled on it is that a passport is a public document and it must be produced. It is something that the defendant can keep to himself.

There is no way of knowing whether the defendants knew this at the time that Mr. Inness' passport was provided or that Miss McLenan's passport was lost. But it is one of the factors of law in considering with what the collateral issue is on the trial here.

Finally I mentioned you are not to decide the case or any issue of fact on the basis of the number of witnesses or the number of exhibits.

The bulk of testimony was by the Government. I don't know how the bulk of cross-examination went, but your decision in any rate depends on the quality of the testimony and not on the quantity that either side produced.

With respect to objections and rulings as to testimony or exhibits you shouldn't try to guess on the answer if I didn't let it come in and you should disregard any evidence that I struck out and consider the case only on the testimony and the exhibits which came in without objection and the stipulations of the

parties that have been placed on the record. A-6/

A federal judge has the right to comment on the evidence. In fact, I can marshall the whole evidence and I can spend half the day reviewing my recollection of what took place. But you have heard about two hours and three quarters by the defendant, and two hours and a quarter by the Government and I think you have had enough on that.

Just a few things that seem to me significant, and these illustrate the differences that can be drawn with respect to inferences.

When Miss McLenan was summoned back by telephone from Athens or telegram to come back and see her sick mother it seemed to me from her own testimony she did not take the next plane to Panama. She waited two or three days until Miss Cortez was around.

Now, you can infer that was because she called Panama and she said, as she stated later, that her mother was not really that ill. Or you can infer she was waiting so that she can take Miss Cortez with her with false birth

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certificate that Mr. Inness provided so to combine a trip to purchase cocaine with a trip to see her sick mother.

There was discussion about the safe deposit box. The only evidence with respect to this safe deposit box is what Miss McLenan testified to. And since further information with respect to it was available to either side you can't draw any inference with respect to [illegible] failure to produce and determine the credibility to give to Miss McLenan's testimony and by inferences which can be drawn from it.

There was discussion during Mr. De Petris' summation about when Mr. Welch made his last purchase, said he made his last purchase.

My notes were that he said he bought some after March and April and during the summertime. Whether he said afterwards that it was in the month of June I am not sure.

As you observed, counsel can't always be accurate in the way they described testimony and even the Court can't.

There was a lot of talk at one point

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during the cross-examination of Miss Cortez about the fact that she had lived four months with Miss McLahan. When the documents came in it came out it was about from about March 19th to May 16th, which is a little over two months.

There was reference to Mr. Welch's reluctance to testify and to the presence of people in the courtroom.

I think you should bear in mind there is no testimony or evidence that there was any threats against Mr. Welch by any of the defendants.

You may consider whether there was any reluctance to testify because of the fact that he was brought in on a material witness warrant. And there is nothing else you can consider with respect to the defendants on that basis.

There is a good argument that the defendants have with respect to Miss Cortez having told the Agent at the beginning and Mr. London when he came and talked to her that

she was not bringing the cocaine in for Miss McLenan and Mr. Inness and she used the name Morales which she said at one point was a name she just made up. A-64

Mr. Lalletris addressed himself to that point and it will be up to you to determine how much weight to give to that difference between her statements when she was not under oath and her testimony as she gave it in this court.

As I have said, there is a great deal of evidence in the case. You have been listening attentively. And while you haven't been taking any notes you have had no distractions and I think you do remember it fairly well.

The fact that I may have emphasized a couple of points either in illustrating types of evidence or in commenting does not mean you shouldn't consider everything you have heard and is not to be taken as an impression of an opinion on the guilt or innocence of either of the defendants. You are the judges

of the facts. Nothing counsel said or nothing I said prevents you from making your own determination on the facts on your own recollection of the evidence and in applying those facts to the law as I have set it forth.

Now a few words about reaching a verdict.

First, of course your verdict must be unanimous on each count. That means you must all agree on each count.

It is wise to discuss the evidence fully before taking even a tentative vote, so that no one will jump to a hasty conclusion before weighing the entire case.

If you want to have some of the testimony repeated, the first two days which is mainly Miss Cortez' testimony was transcribed. The rest of it is in reporter's notes and I am not--do you know if Mr. Rubinstein is here today? I am not sure we can get the reporter up--or we can get him up and read it to you if it is necessary. It may take some time to find the reporter who took it.

If you want to look at the exhibits you may ask for it. If you want to look at the

cocaine package I will send a marshall in with it because nobody should be in possession of it even for an innocent purpose.

When you go into the jury room, Mr. Weiner, your foreman, as I have said, he will preside over your deliberations. His principal job will be to try to say that not more than one person talks at a time and to try to give everybody a chance to be heard and to help guide you in determining when you may take a ballot. But his vote counts no more than anyone else.

During your deliberations you should assume the attitude of judges of the facts rather than partisans or advocates. In that way you are making a high contribution to the administration of justice.

You must report a verdict on all three counts. Both defendants are on the first and second counts and only Miss McLenan is on the third count. And I will give you a form of verdict so that you can fill it in without any confusion or uncertainty.

You can find one or both guilty or not guilty on either of the first counts and, of course, Miss McLenan either guilty or not guilty on the third count.

If you have any questions there will be a marshall sitting outside the jury room and you can send a note to him.

When you have reached a verdict the foreman should give him a note merely saying you have reached a verdict. And when you are in court he will announce it orally.

Either party has a right to have the jury polled, and which means to ask each juror whether he or she agrees with the verdict so that we can be sure it is unanimous.

Again, in determining guilt or innocence you shouldn't give any consideration to the matter of punishment because that is my responsibility if either defendant is found guilty.

You are each entitled to your own opinions, but you should exchange your views with your fellow jurors and listen carefully to each other.

While you shouldn't hesitate to change your original opinion if you are convinced that another opinion is correct, but you don't have to give it to a majority and your decisions must be your own.

Normally it takes until about 1 o'clock to get the lunch here. And since that is our normal lunch hour I will excuse counsel at about that time and at least when your lunch comes in and if you have questions try to submit them before one or after two.

There is a procedure in the rules that after the Court has delivered its instructions counsel may take exception to the instructions or to any omissions outside the presence of the jury. So while you go back to the jury room now I may possibly call you out again and add something to the charge. But on the assumption that I may not and we conclude with this, your oaths sum up your duties, that is, without fear or favor to any person, you will well and truly try the issues between these parties according to the evidence given to you

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in court and the laws of the United States.

You will now please go into the jury room and I will excuse Miss Gavney and Mr. Weber. We almost needed one of you but there is no more function for you to perform.

Now let's swear the marshalls before they go in.

(The marshalls are sworn.)

THE COURT: Do the alternates have anything in the jury room you want to get?

AN ALTERNATE JUROR: Yes.

THE COURT: Suppose you get that and the clerk will take you into the witness room and you can wait there until your lunch comes.

(The jury leaves the courtroom for the purposes of beginning their deliberations at 12:01 P.M.)

THE COURT: Are there any exceptions to the charge, Mr. DePetris?

MR. DE PETRIS: No, your Honor.

THE COURT: And Mr. Preminger?

MR. PREMINGER: No exceptions, but I have a request.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

RICARDO EDUARDO INNISS,

Defendant-Appellant.

- X

NOTICE OF APPEAL

Indictment No. 74 CR 791

Name and Address of Appellant: RICARDO EDUARDO INNISS
Federal Penitentiary
Atlanta, Georgia

Name and Address of Attorneys for Appellant: PREMINGER, MEYER & LIGHT
66 Court Street
Brooklyn, New York 11201

Offense: Violation of 21 U.S.C., Sections 841(a)(1), 952(a) and 960(a)(1), conspiracy to conceal, buy and deal in narcotics.

Appellant appeals from the judgment of conviction, convicting him of the above charges rendered August 1, 1975, (Judd. U.S.D.J.), and sentencing him to a term of imprisonment of one to eight years and special probation of five years thereafter.

Appellant is incarcerated at the Federal Penitentiary at Atlanta, Georgia in lieu of $75,000.00 surety bond pending appeal.

Appellant hereby appeals to the United States Court of Appeals for the Second Circuit from the whole and each and every part of the above stated judgment.

Dated: Brooklyn, New York
August 7, 1975

Yours, etc.,

PREMINGER, MEYER & LIGHT
Attorneys for Defendant-Appellant
Office & P.O. Address
66 Court Street
Brooklyn, New York 11201

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TO: Clerk of the United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York

Hon. DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

RECEIVED
U. S. ATTORNEY

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EAST. DIST. WIS.

Service of three (3) copies of the within
is admitted this 1 day of April 19 76

[redacted]